NO. 81644-1

WASHINGTON STATE SUPREME COURT

In re the Detention of:

DAVID W. MCCUISTION,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

ROBERT M. MCKENNA
Attorney General

JOSHUA CHOATE, WSBA # 30867
Assistant Attorney General
Office of the Attorney General
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104
(206) 389-3075

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. IDENTITY OF RESPONDENT

Petitioner is the State of Washington, by and through the Office of the Attorney General.

II. DECISION BELOW

The decision below is a Court of Appeals decision to deny McCuistion's motion to modify a Commissioner's Ruling. The Commissioner of the Court of Appeals, Division II, denied McCuistion's motion for discretionary review of a trial court order rejecting McCuistion's request for a recommitment and thus continuing his civil commitment as a sexually violent predator (SVP). *In re Detention of McCuistion*, Ruling Denying Review at 1-4, No. 35805-1-II (January 30, 2008) (Appendix A to Motion for Discretionary Review).

III. ISSUES PRESENTED FOR REVIEW

This is a motion for discretionary review of a trial court order continuing McCuistion's civil commitment. For the reasons stated below, the issues presented in the motion are not appropriate for review under the considerations of RAP 13.5(b). If review were accepted, the issues would be:

1. McCuistion offered no evidence of change after his SVP commitment. Does RCW 71.09.090, as amended in 2005, deny McCuistion substantive due process?
2. Do the 2005 amendments to RCW 71.09.090 violate the doctrine of separation of powers?

3. Did the trial Court err in concluding that McCuistion failed to establish probable cause that his underlying mental condition had changed?

4. Does this Court's decision in *In re Detention of Elmore*, 162 Wn.2d 27, 31, 168 P.3d 1285, 1287 (2007) require reversal of the trial court's order?

IV. STATEMENT OF THE CASE

David McCuistion is civilly committed as a sexually violent offender based on his history of sexual assaults of women and girls that dates back to 1980. In that year, he was convicted of Attempted Indecent Liberties in Pierce County for an assault on two girls, ages 5 and 6. CP 56. In 1983, he committed a violent assault against a pregnant 19-year-old woman. CP 57. In 1986, McCuistion was convicted of telephone harassment for making calls that included threats to rape and kill. *Id.* In 1988, McCuistion was convicted of Assault in the Second Degree. CP 58. In 1989, McCuistion pulled a gun on a 15-year-old girl, and told her to get into his car. RP at 79. McCuistion pleaded guilty to a charge of Assault in the Third Degree. *Id.*

McCuistion's last conviction occurred in 1993, in Clark County when McCuistion violently assaulted and raped a woman. CP 59. McCuistion was charged with Second Degree Rape, and pleaded guilty to the lesser charged Third Degree Rape and Third Degree Assault because the victim did not want to face trial. *Id.*

Prior to his release, the State filed an SVP petition. On October 3, 2003, McCuistion was committed. Since his commitment, McCuistion's case has been reviewed annually. In 2004, Carole DeMarco, Ph.D. evaluated McCuistion and determined that he continued to suffer from Paraphilia, Not Otherwise Specified (Rape) and Antisocial Personality Disorder. CP 19. In 2005, McCuistion's case was reviewed by Carla van Dam, Ph.D. Dr. van Dam reached conclusions substantially comparable to those of Dr. DeMarco. *See* CP 68-72. During both review periods, McCuistion chose not to participate in sex offender treatment. CP 12, 71.

A consolidated review hearing concerning the 2004 and 2005 review periods was held on October 27, 2006.[1] CP 584. The State relied upon the van Dam and DeMarco reports. Dr. Lee Coleman, M.D. opined, in part, that there was insufficient evidence to conclude that McCuistion had ever suffered from a Paraphilia. CP 617. The trial court denied a further trial and found that the State had produced evidence that McCuistion continued to meet the definition of an SVP, and that McCuistion had not provided prima facie evidence that his condition had changed since his commitment. CP 586.

[1] The failure to hold hearing in 2004 and 2005 was based on McCuistion's repeated requests for delay in order to obtain expert services. See CP 590-591.

V. REASONS WHY REVIEW SHOULD BE DENIED

McCuistion fails to meet the requirements of RAP 13.5. Under RAP 13.5(b), McCuistion must demonstrate that the appellate court committed obvious or probable error. RAP 13.5(b) provides:

> **(b) Considerations Governing Acceptance of Review.** Except as provided in section (d), discretionary review may be accepted only in the following circumstances:
>
> (1) The superior court has committed an obvious error which would render further proceedings useless;
>
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.

RAP 13.5(b). McCuistion does not meet these standards because he shows no probable or obvious error. His arguments ignore the established law allowing an indefinite commitment, provided there is an annual review. In denying review of the trial court's decision, the court of appeals simply recognized that McCuistion had not provided the trial court with any reason to order further proceedings. There can be no obvious or probable error where a trial court follows the law. Additionally, McCuistion's *status quo* has not changed, as he is still subject to indefinite commitment, nor has his freedom to act been substantially limited as he may again petition the court for either an LRA trial or an unconditional release trial at any time.

A. Purpose and Procedure of the RCW 71.09.090 Show Cause Hearing

The purpose of the annual review show cause hearing is to determine:

> whether probable cause exists to warrant a hearing on whether: (i) The person's condition has so changed that he or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.090(2)(a).

The purpose of the show cause hearing is not to "re-commit" the Respondent, but to ensure that there is a continuing basis for the commitment. RCW 71.09.090(2)(a). Commitments are indefinite, persisting "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe either (a) to be at large, or (b) to be released to a less restrictive alternative as set forth in RCW 71.09.092." *In re Petersen,* 138 Wn.2d 70, 78, 980 P.2d 1204 (1999) (*Petersen I*). As a result, the scope of the hearing is limited:

> The show cause hearing is in the nature of a summary proceeding wherein the trial court makes a threshold determination of whether there is evidence amounting to probable cause to hold a full hearing. The show cause hearing is an expression of the Legislature's wish that judicial resources not be burdened annually with full evidentiary hearings for sexually violent predators absent at least some showing of probable cause to

believe such a hearing is necessary.

Id. at 86. The proceeding is limited to the submission of affidavits or declarations. RCW 71.09.090(2)(b).

At the show cause hearing, there are two statutory avenues for a court to find probable cause for an evidentiary hearing under RCW 71.09.090(2): (1) by deficiency in the State's proof, or (2) by sufficiency of proof by respondent. *In re Detention of Petersen v. State*, 145 Wn.2d 789, 798-799, 42 P.3d 952 (2002) (*Petersen II*).

The State must present prima facie evidence that respondent continues to meet the criteria for civil commitment, and that there is no feasible less restrictive alternative (LRA). RCW 71.09.090(2)(c)(i). "If the State cannot or does not prove this prima facie case, there is probable cause to believe continued confinement is not warranted and the matter must be set for a full evidentiary hearing." *Petersen II*, 145 Wn.2d at 798-99. Once the State satisfies its prima facie burden, a new trial may be ordered only if respondent's proof establishes probable cause:

> to believe that the *person's condition has so changed* that: (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community.

RCW 71.09.090(2)(c)(ii) (emphasis added).

There is no dispute that the State made the prima facie showing necessary to preserve McCuistion's indefinite commitment. This case concerns evaluation of McCuistion's claim that he never met statutory criteria in the first place.

1. The 2005 Amendments to RCW 71.09.090

In 2005, through SB 5582, the Legislature amended the statute providing for annual review of persons committed as SVPs, RCW 71.09.090, in order to correct the statutory interpretations set forth in *In re Young*, 120 Wn.App. 753, 86 P.3d 810, *review denied*, 152 Wn.2d 1035, 103 P.3d 201 (2004) and *In re Ward*, 125 Wn.App. 381, 104 P.3d 747 (2005). *See* Laws of 2005, ch. 344, § 1 ("The Legislature finds that the decisions in [*Young* and *Ward*] illustrate an unintended consequence of language in chapter 71.09, RCW").

The "unintended consequence" was a proliferation of new commitment trials based solely upon a defense expert's disagreement with the annual review report or the original commitment. *Young* and *Ward* were, therefore, contrary to the legislative intent that RCW 71.09 address:

> [T]he "very long term" needs of the sexually violent predator population for treatment and the equally long term needs of the community for protection from these offenders.

Id. "[A] new trial ordered under the circumstances set forth in *Young* and *Ward* subverts the statutory focus on treatment and reduces community safety. . . ." *Id.*

SB 5582 preserved the State's constitutional requirement to present prima facie proof of a continuing basis for the commitment while clarifying the level of proof necessary to obtain a new trial revisiting Respondent's *indefinite* civil commitment. In a clear statement of its intent, the Legislature noted that "the mental abnormalities and personality disorders that make a person subject to commitment under RCW 71.09, are severe and chronic and do not remit due solely to advancing age or changes in other demographic factors." Laws of 2005, ch. 344, § 1. The Legislature further recognized that, although, "in some cases, a committed person may appropriately challenge whether he or she continues to meet the criteria for commitment," the focus of any such review was to consider "**evidence of a relevant change in condition from the time of the last commitment trial proceeding:**"

> These provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, **not an alternate method of collaterally attacking a person's indefinite commitment for reasons unrelated to a change in condition.** Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials. Therefore, the legislature intends to clarify the "so changed" standard.

Id. (emphasis added).

To maintain focus on these interests, SB 5582 clarified the specific probable cause showing necessary to revisit an indefinite commitment:

> (4)(a) Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial proceeding, *of a substantial change in the person's physical or mental condition* such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.
>
> (b) A new trial proceeding under subsection (3) of this section *may be ordered, or held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition* since the person's last commitment trial proceeding:
>
> > (i) An *identified physiological change* to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or
> >
> > (ii) *A change in the person's mental condition brought about through positive response to continuing participation in treatment* which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

RCW 71.09.090(4) (emphasis added). In this way, the Legislature restored the focus on a *change* in the person's *mental condition* and the

centrality of sex offender treatment before a new commitment trial is warranted.

McCuistion's request for a new commitment trial fails under these standards and he makes little argument to the contrary. In particular, McCuistion's evidence failed to address any change since his initial commitment. Instead, he uses the annual review for a collateral attack. .

B. There is No Obvious or Probable Error in Denying a New Trial

Before this Court can accept review, RAP 13.5(b) requires Petitioner to show that the court of appeals has committed obvious or probable error *and* the decision substantially alters the status quo or substantially limits the *freedom of a party to act.* At McCuistion's October 27, 2006 annual review hearing, the trial court appropriately determined that McCuistion had not shown any evidence of change. In denying discretionary review of that decision, the court of appeals did not commit obvious or probable error that would justify review under RAP 13.5(b)(1). Rather, in its ruling denying review, the Court noted,

> McCuistion presented evidence that challenged his initial and continued diagnoses of Paraphilia. He also presented evidence that his behavior in the [Special Commitment Center] had improved during his commitment. But **he presented no evidence that his physical or mental condition had changed since the trial court originally found him to be a SVP.** Without such evidence, the trial court was not required to order a new commitment trial. As

> a result, the trial court did not obviously or probably err when it ordered McCuistion to remain confined as a SVP.

Commissioner's Ruling at 6-7 (emphasis added).

Prior to the statutory amendment clarifying the meaning of "so changed" in RCW 71.09.090(2), the statute simply required that, in order to order a recommitment trial, the trial court first find that probable cause exists that the SVP's condition has so changed that he no longer meets the definition of a sexually violent predator. Laws of 2005, ch. 344, § 2. Because "no evidence" of a change in condition was presented to the trial court, it cannot be argued that the appellate court committed obvious error when it denied discretionary review of the trial court's denial of a recommitment trial. McCuistion's motion for discretionary review by this Court should be denied.

1. Dr. Coleman's Report Does Not Show Probable Error Because it Simply Attacks the SVP Criteria

To claim probable error, McCuistion relies on a declaration of Dr. Lee Coleman, M.D., which he offered at the review hearing before the trial court. Dr. Coleman does not address the relevant statutory criteria. Instead, he chooses to attack the statute and the methods of risk assessment used by experts in the field and accepted by the appellate courts of this state. Dr. Coleman wrote that "I have formed the opinion that [Mr. McCuistion's] evaluators have not presented any evidence that

such a mental abnormality exists, or has ever existed." CP 617 (emphasis added). He further argued that "mental health professionals cannot distinguish between those who commit such crimes as part of a 'mental abnormality' and those who commit such crimes for other reasons." CP 622. Dr. Coleman's evidence was therefore that every evaluation performed of McCuistion was without basis, was simply a re-statement of his behavior, and, finally, that both actuarial and clinical methods are entirely unreliable and are of no use in predicting re-offense. CP 623.

Dr. Coleman essentially repeated arguments previously rejected by our State Supreme Court in *Young I* and then again by the United States Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501(1997), as well as numerous other decisions by this Court. Not only is the report a collateral attack on McCuistion's initial commitment, it attacks the SVP statutory criteria. This record does not present any showing of probable error because it is merely an attempt to relitigate settled law allowing for an indefinite commitment based on proof that a person is a SVP. The legislative findings for the amendments to RCW 71.09.090 specifically address such an approach, stating that "[t]hese provisions are intended only to provide a method of revisiting the indefinite commitment due to a relevant change in the person's condition, *not an alternate method of collaterally attacking a person's indefinite*

commitment for reasons unrelated to a change in condition. Where necessary, other existing statutes and court rules provide ample opportunity to resolve any concerns about prior commitment trials" (emphasis added).[2]

Furthermore, no evidence was offered in this case to implicate the 2005 statutory amendments. As noted by the commissioner, McCuistion presented "no evidence that his mental or physical condition had changed". Even under the pre-2005 amendment version RCW 71.09.090, the declaration of Dr. Coleman fails to constitute evidence that his mental or physical condition had changed at all since his commitment precludes a recommitment trial. Thus, in light of the evidence presented to the trial court, the court of appeals did not err in denying further review based on an attack of those amendments. For this reason, this Court should also deny further review of McCuistion's case.

2. McCuistion's Other Evidence Also Failed to Set Forth Any Basis for a New Trial

Although a trial court may not weigh the committed person's evidence when determining whether probable cause exists to hold an evidentiary hearing, it must still decide whether the facts, if believed, establish that the person is no longer an SVP. *Petersen II,* 145 Wn.2d at

[2] Although McCuistion has not moved for collateral relief, that avenue remains open to him for challenging his commitment. *See* RCW 71.09.070(4).

798. In addition to Dr. Coleman's report, McCuistion also presented evidence to the trial court that he had not acted out in a sexually violent manner while under the very secure conditions of the SCC. McCuistion has been continuously incarcerated since 1993. That a violent rapist is able to avoid committing new sexual crimes under such conditions is not evidence that the change required by statute has in fact occurred. Further, the trial court was also provided with evidence that McCuistion had, in fact, failed to control his behavior on several occasions during the review period. The trial court was informed that McCuistion received multiple Behavioral Management Reports (BMRs), which document "specifically problematic" incidents that had occurred at the SCC. CP 13, 15-16. Thus, the trial court made its decision fully aware that, while McCuistion did present some favorable behavioral information, his performance during the review period was far from ideal. For that reason, even if McCuistion's evidence is taken as true, neither the trial court, nor the court of appeals, committed obvious or probable error in coming to a decision that reflected the context of the entire review period.

3. Due Process Was Satisfied by the Annual Review Procedures Followed by the Trial Court in This Case

This Court has upheld the statutory scheme requiring change under RCW 71.09.090 in two cases in the face of a due process challenge: *In re*

the Detention of Petersen, 145 Wn.2d 789, 42 P.3d 952 (2002) and *In re the Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999). McCuistion shows nothing in his case that would be amount to probable or obvious error violating substantive due process. The state presented prima facie evidence that he continued to be both mentally ill and dangerous. McCuistion provided the trial court with no evidence that he had "so changed that he was no longer an SVP." *In re Petersen*, 145 Wn.2d at 796. Consequently, due process has been satisfied.

It is clear that civil commitments under RCW 71.09 are indefinite in nature. A person is civilly committed under RCW 71.09.060(1) "for control, care, and treatment until such time as . . . [t]he *person's condition has so changed* that the person no longer meets the definition of a sexually violent predator." (Emphasis added). Civil commitments are not subject to any rigid time limit. Rather, *the commitment is tailored to the nature and duration of the mental illness*. *In re Young*, 122 Wn.2d 1, 39, 857 P.2d 989 (1993) (emphasis added).

In *In re Petersen I*, this Court held:

> "[O]ur sexually violent predator statute *unequivocally contemplates an indefinite term of commitment*, not a series of fixed one-year terms with continued commitment having to be justified beyond a reasonable doubt *annually* at evidentiary hearings where the State bears the burden of proof."

138 Wn.2d at 81 (*emphasis added*).

Indeed, "[t]he term of commitment under Washington's statute is potentially indefinite because it depends on the cure or elimination of the person's sexually violent predilections." *Id.* at 81 n. 7. Because the treatment needs of the sexually violent predator population are long-term and the mental conditions are chronic, "the statute contemplates a prolonged period of treatment." *Id.* at 78.

Under the *Foucha v. Louisiana,* 504 U.S. 71, 112 S. Ct. 1780 (1992) holding, "continued confinement" is permissible following a showing of "mental illness and dangerousness." *In re Young*, 122 Wn.2d 1, 36-37, 857 P.2d 989 (1993) (discussing *Foucha* holding with regard to RCW 71.09). The State carries its burden of proof at the annual review to "justify continued incarceration" by presenting prima facia evidence that the individual continues to be a sexually violent predator. *In re Petersen II*, 145 Wn.2d at 958. Because the statute imposes this requirement on the state annually through RCW 71.09.070 and .090, the statute satisfies the constitution.

McCuistion's arguments fail to show probable or obvious error because he completely overlooks this controlling precedent. The constitution does not require an annual trial to hear evidence of the type offered by Dr. Coleman — evidence that shows no change, but which

attacks the SVP definition, attempts to retry the original SVP commitment, and offers anecdotes of good behavior. In accord with *Foucha*, the case law makes it clear that the constitution requires only periodic review in order to maintain an indefinite civil commitment.

This Court has also already held that the dangerousness of sexually violent predators justifies indefinite commitment with annual review procedures, rather than the semi-annual recommitment trials found in RCW 71.05. *In re Petersen I*, 138 Wn.2d 70, 78-81, 980 P.2d 1204 (1999) (Statute provides for indefinite commitment with periodic reviews, not periodic determinate commitments).[3] Also, the eleventh circuit held that "[d]ue process does not always require an adversarial hearing." *Williams v. Wallis,* 734 F.2d 1434, at 1438 (quotation omitted). Due process was satisfied merely through nonadversarial reviews of the committee's current condition by hospital staff. 734 F.2d at 1438. The "nonadversary periodic review satisfies due process under the *Mathews v. Eldridge* balancing test." *Id.* at 1439.

The annual reviews undertaken by the Department of Social and Health Services under RCW 71.09.070 satisfy this concern. McCuistion had that review in this case, and presented no evidence that pertained to

[3] The Wisconsin Supreme Court similarly rejected the need for heightened review procedures when addressing indefinite civil commitment under the Wisconsin SVP statute. *State v. Post*, 197 Wis.2d 279, 541 N.W.2d 115, 132 (1995), *cert. dismissed*, 138 L.Ed.2d 1011 (1997).

the issues before the trial court at that time. This Court need not accept his invitation to engage in a constitutional analysis of a statutory amendment that was not implicated by the proceeding below.

C. The Amendments to RCW 71.09.090 Do Not Violate the Constitutional Separation of Powers

McCuistion also seeks review by arguing that 2005 amendments to RCW 71.09.090 violate the separation of powers doctrine by "limiting" the type of evidence a committee may present to demonstrate he is entitled to an unconditional release trial. Motion at 11. However, the legislature does not violate separation of powers principles by amending the law in response to a court's ruling. *Pierce County v. State*, __ Wn. App. __, 185 P.3d 594, 613 (Div. 2, 2008) *citing Miller v. French*, 530 U.S. 327, 347, 120 S.Ct. 2246 (2000); (although injunction at issue was final judgment for purposes of appeal, it was not last word of judicial department and could be modified to comply with subsequent changes in the law); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004) (legislature may clarify a law in response to an administrative adjudication or trial court decision); *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal,* 39 Wn.App. 609, 620, 694 P.2d 697 (1985). As noted above, the 2005 amendments to RCW 71.09.090 were enacted in response to *In re Young*, and *In re Ward*, supra.

In addition, Division Two has twice considered and rejected an argument identical to McCuistion's in *In re Detention of Joel Reimer*, Slip. Op. __ (July 29, 2008) and *In re Detention of Fox*, 138 Wn.App. 374, 158 P.3d 69 (2007), *rev. granted and remanded on other grounds*, 162 P.3d 1019 (2008). There, appellants complained that RCW 71.09.090 limited their ability to present actuarial evidence because that evidence did not specifically relate to a change in mental condition or treatment progress. The Court rejected the premise of the argument that the statute addresses specific evidence:

> [T]he Legislature has not mandated that the courts admit or reject specific evidence or weigh certain pieces of evidence. Rather, the Legislature has provided clarity for the courts about the statute's definition of an SVP's "changed condition" sufficient to warrant reconsideration of his continued commitment under the Act.

138 Wn.App 374 at 396.

The statutory procedures do "not deprive them of an opportunity to present actuarial data to a trial judge or jury. The statute merely requires that they first produce some evidence showing some change in their mental conditions . . . ." *Id.* McCuistion's argument similarly shows no probable or obvious error. The legislature has not intruded on a fundamental judicial role; it has simply required some evidence of change.

D. *In re Elmore* Does Not Mandate Reversal of the Trial Court's Order

McCuistion finally argues that this Court should accept review based on *In re Detention of Elmore*, 162 Wn.2d 27, 31, 168 P.3d 1285, 1287 (2007). The Legislature amended RCW 71.09.090 effective May 9, 2005. In *Elmore*, this Court noted, "The triggering event for the amendment is the initial probable cause determination . . .." *Elmore* at 36, n. 7. McCuistion's annual review hearing was held on October 27, 2006, and the order denying his recommitment trial was entered on February 20, 2007. CP 584. These events occurred well after the effective date of the statutory amendments and *Elmore* does not apply. *Id.*; *see also In re Detention of Smith*, __ Wn.2d __, 184 P.3d 1261, 1261 (2008).

VI. CONCLUSION

Because McCuistion fails to establish that the Court of Appeals committed obvious or probable error during his annual review hearing, the State asks the Court to deny discretionary review.

RESPECTFULLY SUBMITTED this 30th day of July, 2008.

JOSHUA CHOATE, WSBA # 30867
Assistant Attorney General
Attorney for State of Washington

NO. 81644-1

WASHINGTON STATE SUPREME COURT

In Re the Detention of:

David W. McCuistion

Respondent.

DECLARATION OF SERVICE

I, Elizabeth Jackson, declare as follows:

On July 30, 2008, I deposited in the United States mail a true and correct copy of Response to Motion for Discretionary Review, postage affixed, addressed as follows:

Nancy Collins
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of July, 2008, at Seattle, Washington.

Elizabeth Jackson
ELIZABETH JACKSON